SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 6 1968
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1103

MILDRED R. LAHMAN, SURVIVING WIDOW AND ADMINISTRATOR OF ESTATE OF JOHN H. LAHMAN, DECEASED,

Appellant,

vs.

W. E. GOULD AND COMPANY, HARRIET B. GOULD, EXECUTOR OF WILL OF W. E. GOULD, DECEASED, AND PHILIP H. MITCHEL, MASTER IN CHANCERY,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS.

MOTION TO DISMISS ON BEHALF OF APPELLEES.

CALVIN P. SAWYIER,
38 South Dearborn Street,
Chicago, Illinois 60603,
Counsel for Appellees, W. E. Gould and Company and Harriet B. Gould, Executor of will of W. E. Gould, deceased.

WINSTON, STRAWN, SMITH & PATTERSON,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

PAGE

Argument:

I. Jurisdiction Is Lacking Here 6

A. Appellant's present claim that a substantial federal question is presented contradicts the procedure he elected to follow below 6

B. The purported issue of the validity of a local trial court administrative rule was not timely or properly raised or passed on below 8

C. Even as posed in untimely fashion upon petition for discretionary review by the State Supreme Court, the issue relating to Circuit Court Rule 9.3 rest on an adequate non-federal basis 10

II. No Substantial Federal Question Is Presented Here 13

A. The merits of appellant's underlying claim for rescission of contract present no federal question reviewable by this court 13

B. Appellant's procedural claim of no fair hearing presents no substantial issue 15

Conclusion 18

Motion to Dismiss 1

Statement 2

Authorities Cited.

Cases.

American Ry. Exp. Co. v. Levee, 263 U. S. 19, 20-21 (1923) 9

Bailey v. Anderson, 326 U. S. 203, 205, 206-7 (1945) ..10, 17

Beck v. Washington, 369 U. S. 541, 553 (1961) 9

Bement v. National Harrow Co., 186 U. S. 70, 83 (1901) 15

Biggs v. Cummins, 5 Ill. 2d 512, 516, 126 N. E. 2d 208, 210 (1955) 9

City of West Frankfort v. Fullop, 6 Ill. 2d 609, 617, 129 N. E. 2d 682, 687 (1955) 3

Corry v. Campbell, 154 U. S. 629 (1878) 12

Durley v. Mayo, 351 U. S. 277 (1956) 17

Fewkes v. Borah, 376 Ill. 596, 600, 35 N. E. 2d 69, 72 (1941) 2

First National Bank & Trust Co. v. Evanston, 30 Ill. 2d 479, 482-3, 486, 197 N. E. 2d 707, 709 (1964) 7

Forbes v. State Council of Virginia, 216 U. S. 396 (1910) 10

Fox Film Corp. v. Muller, 296 U. S. 207, 210-11 (1935). 17

Herb v. Pitcairn, 324 U. S. 117, 125-6 (1945) 15

Illinois v. Economy Power Co., 234 U. S. 497 (1913) ... 15

Interstate Amusement Co. v. Albert, 239 U. S. 560, 566-7 (1916) 16

Kenny v. Craven, 215 U. S. 125, 129-30 (1909) 15

Lathrop v. Donohue, 367 U. S. 820, 824-5 (1961) 8

Loeber v. Schroeder, 149 U. S. 580, 585 (1893) 12

Lowry v. Silver City Mining Co., 179 U. S. 196 (1900) .. 15

Mallett v. North Carolina, 181 U. S. 589, 592 (1901) ... 10
Milk Wagon Drivers' Union v. Meadowmoor Dairies, 312 U. S. 287, 294 (1941) ... 16
McGoldrick v. Gulf Oil Corp., 309 U. S. 2 (1940) ... 17
People v. Valentine, 60 Ill. App. 2d 339, 344-8, 208 N. E. 2d 595, 598-600 (App. Ct., 1965) ... 7
Peters v. Catt, 15 Ill. 2d 255, 259, 154 N. E. 2d 280, 283-4 (1958) ... 2
Pettigrew v. National Accounts System, 67 Ill. App. 2d 344, 346, 213 N. E. 2d 778, 779-80 (App. Ct., 1966) ... 7
Radio Station WOW v. Johnson, 326 U. S. 120, 128 (1945) ... 10
Rogers v. Jones, 214 U. S. 196, 204 (1909) ... 17
Seaboard Air Line Ry. v. Watson, 287 U. S. 86, 92 (1932) ... 11
Stembridge v. Georgia, 343 U. S. 541, 547 (1952) ... 10
Telluride Power Co. v. Rio Grande Ry., 175 U. S. 639, 647 (1899) ... 15
Washington v. Miller, 235 U. S. 422, 429 (1914) ... 12
Wetherell v. Johnson, 208 Ill. 247, 251, 70 N. E. 229, 231 (1904) ... 14
Wilson v. Loew's, Inc., 355 U. S. 597, 598 (1958) ... 17
Yazoo & Miss. R. R. Co. v. Brewer, 231 U. S. 245, 249 (1913) ... 15

STATUTES.

Illinois Constitution, Article VI:
Section 2 ... 8
Section 5 ... 6, 7

Illinois Revised Statutes, Chapter 110:
Section 2 8
Section 86 7
Illinois Revised Statutes, Chapter 110A:
Section 302 7
Section 315 9
Section 341(e)(6) 9
Section 365 7
United States Code, Title 28, Section 1257(2) 6, 8

TEXT BOOKS.

Jones, "Collateral Security and Pledges" (3rd ed.), Sec. 555 14
Scott on Trusts (2d ed.), Sec. 9, page 83 14

OTHER AUTHORITIES.

Rules of the Supreme Court of the United States:
Rule 16-1(b) 7
Rule 19-1(a) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1103.

MILDRED R. LAHMAN, SURVIVING WIDOW AND ADMINISTRATOR OF ESTATE OF JOHN H. LAHMAN, DECEASED,

Appellant,

vs.

W. E. GOULD AND COMPANY, HARRIET B. GOULD, EXECUTOR OF WILL OF W. E. GOULD, DECEASED, AND PHILIP H. MITCHEL, MASTER IN CHANCERY,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS.

MOTION TO DISMISS ON BEHALF OF APPELLEES.

Appellees, W. E. Gould and Company and Harriet B. Gould, Executor of the Will of W. E. Gould, deceased, move that the Court dismiss this appeal or—treating the papers whereon this appeal is taken as a petition for a writ of certiorari—deny certiorari.

Appellant has recived an exhaustive hearing, extending over some ten years of trial court proceedings and three years of appellate proceedings, and entailing literally thousands of pages each of testimony, exhibits and argument. This appeal merely tries to obtain review of state court findings of fact which establish that the encyclopedic conglomeration of legal claims advanced by appellant, in-

cluding the claim that he did not receive a fair and impartial trial, have no support in this record and are totally without basis in fact. This Court is not a trier of facts and does not sit to review such questions.

Not only are the questions thus presented manifestly not substantial enough to justify this Court's exercise of jurisdiction, but this appeal is not within the jurisdiction of this Court because not in conformity with 28 U. S. C. § 1257(2). The courts below never were properly presented with, and have not passed upon, any federal question concerning the purely administrative Rule 9.3 of the Circuit Court of Cook County, Illinois, the local trial court, which is the "statute" purportedly involved here.

STATEMENT.

This case was filed in 1955, seeking to rescind two business transactions which had taken place some five years earlier between defendant—who was in the church mortgage and loan brokerage business—and plaintiff—who was a commercial developer and business speculator. The matter was referred generally to a master-in-chancery to receive proofs and make recommendations to the trial court. Proofs were not closed until 1959, by which time the defendant, W. E. Gould, who was nearly 90 years old at the time of the taking of evidence before the master, had died. Previously, a motion by defendants for dismissal at the close of plaintiff's evidence had been denied, there being documentary evidence and testimony wholly apart from plaintiff's testimony which had been introduced in support of plaintiff's case. (*Cf.* Jurisdictional Statement, 3-4.) The test applicable on such a motion under Illinois practice was whether "there is *any* substantial evidence tending [in the total absence of rebutting evidence] to prove plaintiff's allegations". *Peters* v. *Catt,* 15 Ill. 2d 255, 259, 154 N. E. 2d 280, 283-4 (1958); *Fewkes* v. *Borah,* 376 Ill. 596, 600, 35

N. E. 2d 69, 72 (1941); *City of West Frankfort* v. *Fullop*, 6 Ill. 2d 609, 617, 129 N. E. 2d 682, 687 (1955).

In November, 1960, plaintiff's present counsel entered his appearance, sought and obtained a reopening of proofs and commenced to file voluminous pleadings and briefs. The master issued his report in July of 1963, received and ruled on objections thereto, and filed the master's report in December, 1963.

The trial court, in considering the exceptions to the master's report, heard extended oral argument on the merits of the case on February 4 and 5, 1964, and appellant also submitted over 2,000 pages of argument, statement of facts, abstract of testimony, data and schedules summarizing evidence, and suggestions for decree.

In March, 1964, appellant filed a petition to suppress the master's report and for other relief, asking that the trial court deny the master fees and proceed to consider the case on the transcript and exhibits and make its own findings and conclusions. The master was made a respondent to this petition and appellant has ever since included the master's name as a party to the various appeals herein. The Chancellor set said petition down for hearing in April, 1964, and heard the testimony of witnesses, including plaintiff, and then, in May, heard further oral argument in the case and thereupon took all the pending matters under advisement. The trial court took until February 17, 1965, to decide the case.

Appellant's petition to suppress had alleged that the deposits made by defendants against accrued master's fees were made "without the knowledge, consent or approval, express or implied" of plaintiff or his attorneys. (2 Abst. 480.) The trial court, hearing the testimony on the petition and deciding the matter in the first instance and with a fairness and impartiality which even appellant has not

sought to impugn, found that (2 Abs. 583; *Cf.* Jurisdictional Statement, p. 7):

> "the said plaintiff's motion to suppress the master's report and the petition upon which it is based are not supported by the greater weight of the evidence adduced at the hearing," and "the evidence clearly establishes that the charges as set forth in plaintiff's petition to suppress the master's report is without merit."

The attorney who had represented the defendants prior to August, 1962, testified that he had—so that plaintiff, who did not have the funds to make any deposit, would not be curtailed in any manner in presenting his case—agreed with plaintiff and plaintiff's then attorney not to go before the trial court for an order requiring deposits from plaintiff over the course of the lengthy master's hearings, but that at the same time defendants could make such deposits as the master might require as security for fees earned. This latter part of the agreement was important for the reciprocal protection of the defendants in the situation thus presented under the master-in-chancery system where, as here, there is an impecunious plaintiff and a financially responsible defendant. A master may naturally be thought to be concerned as to how he will collect his fees for a large case unless he decides for the plaintiff, and the only fair way to permit the plaintiff to proceed without cost is an arrangement, such as was made, to guarantee that the master will receive some fees, however he may decide the case. The master corroborated the above testimony of defendants' then counsel; but payments made pursuant to this arrangement—which were only called for by the master after plaintiff had, after several years, reopened the record and added massively to the master's already enormous task—plaintiff now chooses to call "secret", in a rather reckless and misdirected effort somehow to upset the independent factual

decisions against him of the trial court and of the appellate court below.

The trial court had this case under consideration for many months. In deciding the matter the trial court made several independent findings and conclusions from its own direct examination of the record. These independent findings were distinct from those made by the master, which plaintiff sought to impugn, and were extensive and comprehensive enough in themselves fully to support the trial court's decree. (2 Abst. 584-5.) (*Cf.* Jurisdictional Statement, p. 9.)

On appeal the Appellate Court, whose review and statement of the case demonstrates a real familiarity with this record, thoroughly canvassed and confirmed the findings and determinations of the trial court, including the clear lack of credibility of plaintiff's testimony. (226 N. E. 2d 443, 448-9; Appendix to Jurisdictional Statement, pp. 12-13.)

The case was then thrice presented to the Illinois Supreme Court, first by petition for leave to appeal, then by motion for reconsideration of the petition for leave to appeal and to treat said petition as an appeal as of right (on the purported ground that a constitutional question arose for the first time as the result of the action of the Appellate Court), and finally by motions (in which appellant joined) for reconsideration of petition for leave to appeal and to be made parties to these proceedings filed by certain general creditors of the appellant whose claims arose from loan transactions with appellant entirely unrelated to any transactions between appellant and appellees. The Illinois Supreme Court decided each of these petitions against appellant without rendering any opinion, and the present appeal to this Court followed.

ARGUMENT.

I.

JURISDICTION IS LACKING HERE.

The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. § 1257(2) governing appeals from final judgments of state courts where the validity of a state statute is upheld as against argument that it is repugnant to Federal law.

Jurisdiction fails at the threshold.

A. Appellant's Present Claim That a Substantial Federal Question Is Presented Contradicts the Procedure He Elected to Follow Below.

That appellant presented no federal constitutional question of any substance concerning the validity or construction of any state statute is clear from the procedure which appellant himself elected to follow in the state court system. By appealing to the Appellate Court of Illinois, rather than directly to the Supreme Court of Illinois, appellant conceded that no substantial question "arising under the Constitution of the United States or of this State" was involved (*Constitution of Illinois,* Article VI, Section 5, 2nd paragraph), although appellant had cited to the trial court Rule 9.3 of the Circuit Court of Cook County and claimed to have been deprived of a fair hearing contrary to due process of law. (2 Abst. 481, 483, 556-7, 565.)

Under Illinois law the Appellate Court has no jurisdiction of other than routine constitutional questions which are so well-settled as not to be fairly debatable and whose resolution depends on the facts of the particular case and

is of interest primarily to the immediate parties. *Pettigrew* v. *National Accounts System*, 67 Ill. App. 2d 344, 346, 213 N. E. 2d 778, 779-80 (App. Ct., 1966); *People* v. *Valentine*, 60 Ill. App. 2d 339, 344-8, 208 N. E. 2d 595, 598-600 (App. Ct., 1965).

Had a substantial constitutional question been involved —as appellant now urges—appeal would have been taken directly to the Illinois Supreme Court; or had any substantial constitutional question been made to appear in the course of the appeal to the Illinois Appellate Court, that court would have transferred the case immediately to the Illinois Supreme Court. *Constitution of Illinois*, Article VI, Section 5, 2nd paragraph; *Illinois Revised Statutes*, Ch. 110, §§ 86 and Ch. 110A, §§ 302, 365 (formerly Ch. 110, §§ 101.28-1).

The Illinois Supreme Court has clearly and expressly held that the standard of a "substantial" constitutional question under the above Illinois appellate practice is the same as that applied by the Supreme Court of the United States in determining whether the substantial federal question requisite to its exercising jurisdiction either on appeal or certiorari from state decisions is present. *First National Bank & Trust Co.* v. *Evanston*, 30 Ill. 2d 479, 482-3, 486, 197 N. E. 2d 707, 709 (1964).

Therefore, the state procedure elected by appellant is determinative against this Court's consideration of this case, either as an appeal or treated as a petition for certiorari, by reason of the recognized lack of a substantial constitutional question in the proceedings below. (*Rules of The Supreme Court of the United States*, Rule 16-1(b), Rule 19-1(a).)

B. The Purported Issue of the Validity of a Local Trial Court Administrative Rule Was Not Timely or Properly Raised or Passed on Below.

The State judicial rule-making power in respect to all general matters of pleading, practice and procedure is vested in the Illinois Supreme Court. *Constitution of Illinois,* Article VI, Section 2. Subject to this rule-making and administrative authority of the Illinois Supreme Court, the local trial courts (Circuit Courts) "may make rules regulating their dockets, calendars and business." *Illinois Revised Statutes,* Chapter 110, § 2. Whether local administrative court rules, like Rule 9.3 of the Circuit Court of Cook County asserted here, have the "legislative character" which is decisive of the meaning of the word "statute" in 28 U. S. C. § 1257(2) is, perhaps, doubtful. Cf. *Lathrop* v. *Donohue,* 367 U. S. 820, 824-5 (1961). But, in any event, it is clear that the failure of appellant below to place in issue the constitutional validity of this Rule is decisive against his purported appeal under the requirements of § 1257(2) that (a) the validity of this "statute" have been questioned below on federal constitutional grounds, and (b) the court below have passed on this question by upholding the validity of this "statute."

Out of 120 pages of trial court brief in support of the petition to suppress the master's report, out of 200 printed pages of Appellate Court briefs arguing this case, and out of 24 closely-typed pages of petition for rehearing before the Appellate Court, there is not one word by appellant claiming that Rule 9.3 might be invalid. [Indeed, there are only two sentences out of this mass of argumentative material which even mention the due process clause of the Federal Constitution, and then only in connection with the general claim of the guarantee of a hearing before a fair and impartial tribunal.] (2 Abst. 518-581, 565; Brief (p.

75) and Reply Brief for Appellant in Illinois Appellate Court; Petition for Rehearing in Illinois Appellate Court; *See* Jurisdictional Statement, pp. 22-23.) Under Illinois procedure, constitutional challenges must be made from the trial court stage and they must specify in what particular respect the statute violates some constitutional limitation. *Biggs* v. *Cummins,* 5 Ill. 2d 512, 516, 126 N. E. 2d 208, 210 (1955).

The Rules of court governing briefs in the Illinois Supreme Court and in the Illinois Appellate Court require that, "in a case involving the construction or validity of a statute", the pertinent parts of the statutory provision in question be set forth verbatim in a separate heading (such as, "Statutes Involved") at the beginning of the brief. *Illinois Revised Statutes,* Chapter 110A § 341(e)(6) (formerly Ch. 110, § 101.39(1), 3rd paragraph and § 201.7, 3rd paragraph). That Rule 9.3 of the Circuit Court of Cook County was not deemed to be so involved is shown by the fact that no such procedure was followed by appellant in presenting his briefs below.

Thus, the failure to argue the validity of Rule 9.3 at all, and, indeed, the failure to argue the more general question of lack of a fair hearing under Federal due process except in one sentence out of 200 pages of appellate brief, constitutes a failure adequately to preserve these questions for review, both under the Illinois procedure and the practice of this Court. *Beck* v. *Washington,* 369 U. S. 541, 553 (1961).

The judgment reviewed here is that of the Illinois Appellate Court, since review thereof by the Illinois Supreme Court was discretionary and that higher court declined to exercise its authority. *Illinois Revised Statutes,* Chapter 110A, § 315 (formerly Ch. 110, § 101.32); *American Ry. Exp. Co.* v. *Levee,* 263 U. S. 19, 20-21 (1923). Hence, the

failure to raise the constitutionality of Rule 9.3 before the Appellate Court, even upon petition for rehearing, the failure of the Appellate Court to pass on the validity of Rule 9.3, and the failure of the Illinois Supreme Court to entertain the petition for leave to appeal preclude review by appeal under 28 U. S. C. § 1257(2) here. *Bailey* v. *Anderson,* 326 U. S. 203, 206-7 (1945); *Mallett* v. *North Carolina,* 181 U. S. 589, 592 (1901); *Radio Station WOW* v. *Johnson,* 326 U. S. 120, 128 (1945); *Forbes* v. *State Council of Virginia,* 216 U. S. 396 (1910); *Stembridge* v. *Georgia,* 343 U. S. 541, 547 (1952).

C. Even as Posed in Untimely Fashion Upon Petition for Discretionary Review by the State Supreme Court, the Issues Relating to Circuit Court Rule 9.3 Rest on an Adequate Non-Federal Basis.

A glance at the opinion of the Illinois Appellate Court under review here will show that it properly treated the issues raised by appellant's trial court motion to suppress the master's report (which also moved to deny fees to the master—2 Abst. 483) under two separate headings: (1) the Appellate Court first decided whether any prejudice or unfairness on the part of the master had been shown, either in his acceptance of deposits or otherwise, and (2) then the Appellate Court construed Rule 9.3 to determine whether that Rule was intended, in addition to governing the administration and allowance of masters' fees, to require suppressing the report of every master who received deposits against his fees without explicit court order. (226 N. E. 2d 443, 447-8, 449-51; Appendix to Jurisdictional Statement, 10-11, 13-16.)

It was conceded at all times throughout the proceedings below that if the master had, in fact, been prejudiced against appellant for any reason, including his receipt of

deposits against his fees, the Illinois law provided the remedy of suppression of the master's report upon motion and proof of such prejudice. (E.g., *see* Brief and Argument for Defendants-Appellees in Illinois Appellate Court, pp. 88-89; Answer to Petition for Leave to Appeal, p. 10.) Both the trial judge and the Appellate Court independently reviewed the facts and each specifically found that (1) the master's report was fair and accurate, and (2) "It is clear that the making of the payments had no effect on the fairness of the report." (226 N. E. 2d 443, 450; Appendix to Jurisdictional Statement, 15, 16; 2 Abst. 583.)

Contrary to appellant's statement (Jurisdictional Statement, pp. 18, 91; Petition for Leave to Appeal to Illinois Supreme Court, p. 91), the court below did *not* hold, by implication or otherwise, that Rule 9.3 of the Circuit Court prevents suppression of a master's report which is unfair because the acceptance of deposits by the master caused him to be impartial (or because of any other reason). The court below *did* hold that the remedy of suppression for bias is provided in Illinois, by motion, but that there was no such bias here and a mere technical violation of Rule 9.3 which did not produce bias permits the Chancellor the discretion to deny or reduce the master's fees but does not automatically require suppression of a master's report.

It follows that the construction or application here of the "statute" (Rule 9.3) upon which appellant seeks to found jurisdiction by appeal did not involve any federal constitutional question, but presents an issue which was adequately resolved under local law. *Seaboard Air Line Ry.* v. *Watson*, 287 U. S. 86, 92 (1932). The remedy of suppression of a master's report is provided under Illinois law, by motion, in every instance where any constitutional requirement of fairness and impartiality may be violated. Therefore, that a local court rule concerning the administration of payments of masters' fees is not construed as

also requiring suppression of a master's report whenever —although no unconstitional unfairness has resulted in any way—the terms of such rule may have been technically violated, does not present a federal question. *Corry* v. *Campbell,* 154 U. S. 629 (1878); *Washington* v. *Miller,* 235 U. S. 422, 429 (1914); *Loeber* v. *Schroeder,* 149 U. S. 580, 585 (1893). The determination below in respect to Rule 9.3 of the Circuit Court of Cook County rests on an adequate non-federal basis.

The only federal question which can be gleaned from this extraordinarily massive record of evidence and argument is the general claim (asserted in 2 short sentences out of 344 pages of argument before the Illinois Appellate Court) that appellant did not receive a fair trial owing to the master's prejudice against him, which prejudice—it is contended—is to be conclusively presumed, as a constitutional rule, even though contrary to the actual evidence (as here), if ever a master accepts deposits against his fees without express court order. This extreme contention does not present a substantial federal question, as will be shown below. In any event, such a procedural claim reaches only to the possibility of appellant being given a new trial; it could not in any wise permit this Court to review the multifarious questions of general equity law which it is appellant's stated purpose to have this Court decide. (Jurisdictional Statement, "Questions presented by this appeal", 1st paragraph, pp. 18-19.)

II.

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED HERE.

A. The Merits of Appellant's Underlying Claim for Rescission of Contract Present No Federal Question Reviewable by This Court.

Appellant summarizes his real complaint, as follows: "The decision of the Appellate Court is contrary to the evidence as well as the manifest weight of the evidence and contrary to law and equity." (Jurisdictional Statement, p. 90.)

The substantive issues involved in appellant's claim for rescission of two business contracts constitute almost the entire bulk of his argument here (Jurisdictional Statement, pp. 24-60, 61-90); yet, they involve no conceivable questions of federal law reviewable by this Court. That no novel or significant question even of local equity law is involved is manifest from the very nature of appellant's legal approach, openly taken [" . . . to recover from defendant loan company by way of redemption, restitution *or* constructive trust", *e.g.*, Jurisdictional Statement, pp. 18-19]—which approach is simply to assemble every known and accepted legal theory upon which rescission of a contract conveying property has ever been based and then attempt to tailor his facts to fit any one or any combination of these theories. In so doing, appellant finds himself in the position where his arguments on the merits are based entirely on cases which assume that the facts in this particular case are directly otherwise than as shown by the record and as found by each of the judicial tribunals below. Not only is there no factual basis for a legal claim that any fiduciary standards of conduct are applicable to the case of a commercial pledge, where, before default, the

pledgor himself, in accord and satisfaction, sells the collateral to the pledgee (*Wetherell v. Johnson*, 208 Ill. 247, 251, 70 N. E. 229, 231 (1904); Jones, "Collateral Security and Pledges", (3rd ed.) § 555; Scott on Trusts (2d ed.), § 9, p. 83); *but*, even if the strictest fiduciary standards were applicable, the facts here are determinative of this case against appellant on any legal theory because, as found, first, by the master and then, independently, by the trial court and thoroughly reviewed by the Appellate Court they show that all fiduciary standards of fairness were met. In handling the imputation of prejudice on the part of the master, the Chancellor not only reviewed the record and the master's report and found no evidence of any inaccuracy or unfairness, but the Chancellor also did exactly as plaintiff requested and made independent findings covering all the key factual issues in this case. These findings were approved by the Appellate Court and they establish, *by decision of judicial tribunals whose fairness appellant does not deign to impugn:* that the challenged transactions were arm's length sales, openly and deliberately made, between competent and informed businessmen on an equal footing, upon full disclosure and opportunity for independent advice, and for a price which is shown to have been reasonable, adequate and fair; also, that the misleading calculations which appellant makes of commissions charged are in large part unrelated to the two sales transactions sought to be set aside and are further wholly irrelevant both legally and factually because commissions charged were never paid and appellant was under no pressure at the time of the challenged transactions to pay any commissions but, rather, such economic pressure as he may have been under came from the demands of appellant's other creditors and obligations. These are the independent findings of fact made by the trial court itself. (2 Abst. 584.)

The United States Supreme Court will not exert its

jurisdiction merely to review a decision of a state court upon questions of general equity law (such as those allegedly applicable here to the rescission of contracts); nor will it review questions such as here, which concern only challenged findings of fact applying settled legal principles to a controversy which is of interest only to the particular parties. *Herb* v. *Pitcairn*, 324 U. S. 117, 125-6 (1945); *Yazoo & Miss. R. R. Co.* v. *Brewer*, 231 U. S. 245, 249 (1913); *Kenny* v. *Craven*, 215 U. S. 125, 129-30 (1909); *Lowry* v. *Silver City Mining Co.*, 179 U. S. 196 (1900); *Bement* v. *National Harrow Co.*, 186 U. S. 70, 83 (1901); *Illinois* v. *Economy Power Co.*, 234 U. S. 497 (1913); *Telluride Power Co.* v. *Rio Grande Ry.*, 175 U. S. 639, 647 (1899).

B. Appellant's Procedural Claim of No Fair Hearing Presents No Substantial Issue.

Appellant's claim of denial of procedural due process involves no novel or fairly debatable questions of constitutional law. Appellant's right, as a litigant, to trial by an impartial tribunal is conceded as a matter of law and was unquestioned below. Again, appellant's difficulty comes from his assertion of claims which are simply refuted by the facts as contained in the record here and in the findings of the lower courts.

Appellant's charge of prejudice on the part of the master-in-chancery has been given most careful and solicitous treatment by the trial court and by the Appellate Court below, both of which made specific determinations—manifestly supported by the record—that there was no basis whatsoever for sustaining any such charge. (2 Abst. 583; 226 N. E. 2d 443, 447-8, 450, Appendix to Jurisdictional Statement, pp. 11, 15-16.) Such findings of fact of the state courts on issues involved in the application of known federal rights to a particular situation in one individual case

are not reviewed by this Court unless they are without any support in the evidence. *Milk Wagon Drivers' Union* v. *Meadowmoor Dairies*, 312 U. S. 287, 294 (1941); *Interstate Amusement Co.* v. *Albert*, 239 U. S. 560, 566-7 (1916).

Appellant is finally reduced to the untenable assertions that one has a Federal constitutional right to have a master's report set aside as being unfair "without the necessity of proving prejudice or partiality" and it is "an unconstitutional burden" to require a person who moves to set aside a master's report for unfairness "to prove prejudice or partiality on part of the master". (Jurisdictional Statement, pp. 18, 19.) Apart from the fact that—because of the Chancellor's independent consideration of the record here—suppressing the master's report would not, in any event, alter the independent judicial basis sustaining the judgment below, it patently does not present a serious and substantial legal question to argue that acceptance of deposits against his fees by a master-in-chancery requires, as a matter of constitutional law, that a conclusive presumption of prejudice in favor of the depositing party be applied. Indeed, the very facts of the present case show why any such conclusive presumption would be wholly unacceptable as a constitutional rule. Here the record and the master's report can be (and have been) rigorously examined without finding any hint of prejudice. Appellant, for whose benefit the defendants below waived their right under the local practice to curtail their opponent's proof unless he made substantial deposits to cover master's fees, now complains that this waiver—although he accepted it and received its benefits and conducted hearings before the master for some 8 years without any expense to himself—was "improper" and "secret" and necessarily and conclusively resulted in his not getting a fair trial. (Jurisdictional Statement, pp. 18, 19, 90-91.) These claims are not only self-stultifying, but they are made

with reckless disregard for the facts and for the determination of the trial court that they have absolutely no support in the evidence.

It should be remembered that appellant does not and cannot complain about the fairness of the Chancellor—the judicial tribunal which, in fact, first decided his case at the trial court level. The master only compiled the evidence and made recommendations to the Chancellor. In some cases the acceptance of the master's recommendations by the Chancellor may be somewhat automatic, but in the present case this was clearly not so. Just as plaintiff had requested, the trial court extended itself and took many months to go through the record, plaintiff's compendious statements of the evidence, and briefs, in order to make its own findings —independent of the master's actions in making his report —covering the key points in this case. These independent findings, made by a concededly unbiased trial court, are wholly sufficient in themselves to support the decree below; and thereby disappears the last vestige of any federal law claim based on any purported action of the master. *Bailey* v. *Anderson,* 326 U. S. 203, 205 (1945). The independent determination by the Chancellor is an adequate and independent non-federal ground upon which to base the judgment below. *Wilson* v. *Loew's, Inc.,* 355 U. S. 597, 598 (1958); *Durley* v. *Mayo,* 351 U. S. 277 (1956); *McGoldrick* v. *Gulf Oil Corp.,* 309 U. S. 2 (1940); *Fox Film Corp.* v. *Muller,* 296 U. S. 207, 210-11 (1935); *Rogers* v. *Jones,* 214 U. S. 196, 204 (1909).

This appeal is only an effort by a disappointed litigant to get this Court to find that the facts are absolutely contrary to what each of the state judicial tribunals below has independently and unequivocally found them to be.

CONCLUSION.

It is respectfully submitted that this appeal should be dismissed, because the purported issue of the constitutional validity of a local trial court administrative rule was neither properly raised nor passed on below and because the questions and rulings below relating to that local rule are matters which rest on state law and adequate non-federal grounds of decision.

In any event, the appeal should be dismissed (and, treated as a petition for writ of certiorari, said petition should be denied) for want of any substantial federal question. This case turns entirely on the findings of fact made below, the absence of any substantial constitutional question having been heretofore recognized by appellant in electing the procedure which he followed in the state courts below.

Respectfully submitted,

CALVIN P. SAWYIER,
38 South Dearborn Street,
Chicago, Illinois 60603,
Counsel for Appellees, W. E. Gould and Company and Harriet B. Gould, Executor of will of W. E. Gould, deceased.

WINSTON, STRAWN, SMITH & PATTERSON,
Of Counsel.